88-1194

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ICELEAN CLARK, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents,

vs.

THE STATE OF MISSOURI, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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January 11, 1989

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QUESTIONS PRESENTED

On September 15, 1987, the District Court below ordered an unprecedented $1.95 increase in the school property tax levy paid by Petitioners to fund court-ordered desegregation remedies. Prior to this, no school district taxpayer had been made a party to this suit; only the State of Missouri and the local school district had been found jointly and severally liable for constitutional violations and only these defendants had been held financially responsible for funding desegregation remedies.

On September 25, 1987, Petitioners moved for leave to intervene in the District Court's proceedings to challenge the constitutional authority of a federal judge to "lay and collect Taxes." The District Court denied Petitioners' request for intervention as "not timely." The Court of Appeals affirmed the denial of intervention on timeliness grounds and, further, affirmed, as modified, the court-ordered property taxation scheme.

The questions presented are these:

1. Did the lower courts erroneously deny Petitioners' request for intervention of right under Rule 24 (a) (2), Fed.R.Civ.P., on grounds of untimeliness contrary to applicable decisions of this Court?

2. Did the lower courts' intervention decisions infringe Petitioners' due process right to protect themselves from an unconstitutional seizure of their property by a federal judge's unprecedented decision to "lay and collect Taxes"?

LIST OF PARTIES AND RULE 28.1 LIST

Petitioners are Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., and Coulas & Griffin Insurance Agency, Inc. These Petitioners are individual and corporate taxpayers who own property within the Kansas City, Missouri School District. Kansas City Mantel & Tile Co. and Coulas & Griffin Insurance Agency, Inc. are Missouri corporations with no parent companies, subsidiaries or affiliates as contemplated by Rule 28.1.

Respondents representing the plaintiff class of schoolchildren below are Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; and Cynthia Winters, by her next friend, David Winters.

The American Federation of Teachers, Local 691 is an intervenor in the District Court proceedings and was a nominal appellee in Petitioners' appeal below (No. 87-2565WM) in the United States Court of Appeals for the Eighth Circuit.

Respondents representing the State defendants in addition to the State itself are the Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; the Missouri State

Board of Education, Roseann Bentley, Dan Blackwell, Terry A. Bond, Delmar A. Cobble, Grover Gamm, Jimmy Robertson, Robert L. Welling, and Donald E. West, Members; and Arthur L. Mallory, Commissioner of Education of the State of Missouri.

A named party below in addition to Respondent School District of Kansas City, Missouri is Claude C. Perkins, Superintendent.*

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*The listings of State Respondents and School District Respondents are as they appeared in the Court of Appeals. The present Superintendent of the School District of Kansas City, Missouri is George Garcia. The present Commissioner of Education for the State of Missouri is Robert E. Bartman. According to the official state manual, the current members of the Missouri State Board of Education are Bentley, Blackwell, Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McCallister, Jr., Cynthia B. Thompson and Roger L. Tolliver.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., and Coulas & Griffin Insurance Agency, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-captioned matter on August 19, 1988.

OPINIONS BELOW

The amended order of the United States Court of Appeals for the Eighth Circuit denying rehearing and rehearing *en banc* (Appendix at A53) is unpublished. The prior panel opinion of the Court of Appeals (App., A1-A52) is reported at 855 F.2d 1295. The September 15, 1987 opinion of the United States District Court for the Western District of Missouri imposing taxes (App., A55-A82) is reported at 672 F.Supp. 400. The October 27, 1987 order of the District Court denying Petitioners' motion for leave to intervene (App., A83-A85) is unpublished.

JURISDICTION

The judgment of the Court of Appeals (App., A86) was entered on August 19, 1988. Petitions for rehearing and rehearing *en banc* were denied on October 14, 1988. This order denying rehearing was amended on October 24, 1988 to include dissents. (App., A53.)

The jurisdiction of this Court to review the judgment and opinion of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

U.S. Const. amend. V provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 24(a)(2), Fed.R.Civ.P., provides:

> **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

This petition embraces fundamental constitutional issues of judicial taxation and due process which have recently arisen out of the Kansas City, Missouri School District ("KCMSD") desegregation litigation. The plaintiff class of schoolchildren filed their complaint in the United States District Court for the Western District of Missouri in 1977 alleging violations of the Equal Protection Clause of the Fourteenth Amendment and seeking desegregation relief. The District Court entered a judgment on September 17, 1984 in favor of the plaintiffs and held the KCMSD and the State of Missouri jointly and severally liable for the equal protection violations in the segregated operation of the Kansas City schools. This judgment rejected an interdistrict remedy involving suburban school districts and imposed an intradistrict remedy against only these two defendants; this judgment was affirmed, as modified, by the United States Court of Appeals for the Eighth Circuit. *See Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984), *aff'd in part & rev'd in part*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 70 (1987).

Since June 14, 1985, the District Court has entered a series of remedial orders approving the expenditure of millions of dollars for capital improvements of the KCMSD and for the funding of the operating and desegregation budgets of the KCMSD. In all instances, the financial liability for such remedies fell only on the KCMSD and the State of Missouri, jointly and severally.

On September 15, 1987, the District Court entered an order approving extensive KCMSD capital improvement projects and a far-reaching magnet schools plan. The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1331. The KCMSD and the State of Missouri again were held to be jointly and severally liable for financing these new programs as well as continued desegregation costs. The court found the KCMSD to be without revenues sufficient to fund its share of the capital improvement costs and additional desegregation expenditures. However, rather than require the State to fund or advance any of the school district's added financial obligations, the District Court granted in part the KCMSD's motion for funding relief and ordered:

> [T]hat in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised [from $2.05] to $4.00 per $100 assessed valuation.

Jenkins v. State of Missouri, 672 F. Supp. 400, 413 (W.D. Mo. 1987), *aff'd in part & rev'd in part*, 855 F.2d 1295 (8th Cir. 1988). (App., A82.)

In arriving at this startling decision, the District Court believed that it was "left with no choice but to exercise its broad equitable powers . . . [to] insure that the constitutional violations committed by the KCMSD and the State of Missouri are cured." (App., A78.) The court went on to conclude that it had "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." (*Id.*, A79-A80.)

Thereafter, both court-ordered taxes were collected from Petitioners and other similarly-situated Kansas City taxpayers.

On September 25, 1987, Petitioners filed with the District Court their motion for leave to intervene of right in the proceedings in order to challenge the trial court's authority and jurisdiction to levy income and property taxes under the United States Constitution. They would be the only litigants in the suit actually paying these new taxes. The District Court denied[1] Petitioners' motion on October 27, 1987, concluding it was "not timely." (App., A84.)

The Court of Appeals affirmed the denial of intervention as "untimely." (App., A48.) The jurisdiction[2] of the Court of Appeals was invoked under 28 U.S.C. Section 1291. The Court of Appeals, relying on previous Eighth Circuit precedent, also affirmed the District Court's $1.95 property tax levy increase, but modified the future

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1. In this order, the District Court did permit Petitioners to participate as *amici curiae*. (App., A83.)

2. Petitioners also timely filed a protective notice of appeal (in No. 87-2693WM) covering the constitutional challenges to the September 15, 1987 taxation decision.

implementation of a court-approved property taxation scheme. (*Id.*, A30-A42.) Chief Judge Lay dissented from the affirmance of the court-ordered property tax. Noting that desegregation liability "was based upon a finding of joint and several tortfeasors" (*id.*, A50), Judge Lay suggested that court-ordered property taxation was inappropriate when the State could be held liable for the KCMSD's desegregation obligations.

The Court of Appeals did, however, reverse the judicially-imposed income tax surcharge, holding that the trial court "invaded the province of the legislature in ordering this surcharge, and that the order [was] beyond the power of the district court as outlined in" specified Supreme Court and Eighth Circuit precedent. (*Id.*, A44.) In reversing the surcharge, the Court of Appeals stated that "[a]ny unexpended collections must be refunded and the district court is directed to take such action as it deems appropriate with respect to any further refunds." (*Id.*, A45.)

On remand, the District Court granted intervention of right to certain Petitioners subject to the surcharge and entertained their motion for a full refund of all surcharge payments made. On January 3, 1989, the District Court granted these Petitioners' motion (on behalf of themselves and all similarly-situated surcharge taxpayers) and ordered the refund of more than $31 million.

REASONS FOR GRANTING THE WRIT

At the core of this petition is the basic question of the power of the federal judiciary in crafting constitutional remedies: Does this power encompass the authority to levy new taxes to generate revenue to fund a constitutional remedy? In this instance, the remedy involves desegregating public schools. However, the precedent established by the lower courts—and their creation of an Article III judicial taxation power—will, if left unchecked, serve as a springboard for future exercises of judicial taxation to remedy other constitutional violations.

This Court has never directly confronted such a question. Certainly, this Court has never sanctioned an Article III taxation power in the federal judiciary. The lower courts' action is a significant departure from the accepted and usual course of judicial proceedings. This newly-developed power presents an extremely important question of constitutional construction.

Petitioners are individual and corporate taxpayers who are paying the court-ordered taxes at issue. They were not parties to the underlying desegregation litigation; they had never been found liable for the constitutional wrongs committed or for the remedies to be implemented. Petitioners had no justiciable interest in these proceedings prior to the trial court's September 15, 1987 taxation decision. Nevertheless, Petitioners have never been permitted to participate as parties in this litigation to assert their constitutional challenges to the taking of their property—a taking accomplished through a court-ordered tax which inures to the financial benefit of all existing litigants, especially the two joint and several tortfeasors, the State of Missouri and the KCMSD.

As a result of the denial of Petitioners' intervention, the issue of judicial taxation cannot be squarely addressed until threshold due process considerations are resolved. First, this Court should recognize the dangerous precedent posed by the lower courts' erroneous intervention decisions. In holding Petitioners' September 25, 1987 request "untimely," and by requiring Petitioners and other Kansas City taxpayers to speculate on the judicial taxation "intentions" of a federal judge, the lower court decisions directly conflict with decisions of this Court and contravene fundamental principles of intervention. Second, the Court should recognize that these illogical rulings have infringed Petitioners' access to due process in the protection of their property from unlawful seizure. Finally, the Court should order arguments on the most important question in this litigation: Do federal courts have the power to "lay and collect Taxes" under Article III of the United States Constitution?

I.

THE LOWER COURTS' DENIAL OF PETITIONERS' INTERVENTION OF RIGHT ON GROUNDS OF UNTIMELINESS IS AN ERRONEOUS AND DANGEROUS PRECEDENT ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Petitioners' Motion To Intervene Was "Timely" Under Applicable Supreme Court Precedent.

Petitioners filed their motion for leave to intervene[3] ten days after the District Court first imposed on them a

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3. This motion was accompanied by the requisite "pleading setting forth the claim or defense for which intervention [was] sought." *See* Rule 24(c), Fed.R.Civ.P.

$1.95 property tax levy increase. Under the unusual circumstances surrounding Petitioners' new-found tax liability, the Court of Appeals' holding that Petitioners "had ample opportunity to file timely [intervention] applications" (App., A47) *prior to* entry of the September 15, 1987 taxation order is illogical and dangerous. It contravenes the purpose and intent of federal intervention principles enunciated in *NAACP v. New York*, 413 U.S. 345 (1973) and *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975) (per curiam); it opens a Pandora's Box of interpretations that will subject federal trial courts to endless speculative applications premised upon what trial courts "might do" or may be "thinking of doing." Considering "all the circumstances," Petitioners' request was timely and denial was an abuse of discretion. *NAACP v. New York, supra*, 413 U.S. at 365-66; Rule 24(a)(2), Fed.R.Civ.P. *See Corby Recreation, Inc. v. General Electric Company*, 681 F.2d 175, 176 n.1 (8th Cir. 1978).

The lower courts concluded Petitioners should have moved for intervention earlier—prior to the entry of the September 15, 1987 taxation order—for two reasons: First, because the District Court previously had discussed its "ability . . . to raise taxes to fund its desegregation remedy" and, in 1985, had actually enjoined the Proposition C property tax levy rollback required under Missouri law. (App., A84 & A48.) Second, because, in a July 6, 1987 order, the District Court "stated its intention 'to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge' "—an "intention . . . reported by the local news media." (App., A84 & A48.) The appellate panel concluded that, "[t]aken together, the orders were more than sufficient . . . to put [taxpayers] on notice

that their interests *would be affected* by" future District Court funding orders. (*Id.*, A48 (emphasis added).)

These statements and actions of the District Court do not provide actual or constructive notice of the District Court's ultimate property and income taxation schemes sufficient to constitute due process any more than they establish a Rule 24(a)(2) interest sufficient to permit Petitioners' intervention prior to September 15, 1987. Taxpayers are neither obliged nor allowed to file tenuous actions premised on the dicta of federal courts.

The previous Proposition C rollback seizure represents a type of tax levy—and justiciable interest—distinct from the two taxes subsequently imposed by the September 15, 1987 order. The courts' reasoning that somehow property taxpayers waived their right to intervene to fight these significant tax increases simply because they did not challenge the relatively inconsequential rollback seizure is erroneous. It is analogous to asserting that because Farmer Jones did not sue the tractor manufacturer when his rig cut off his finger in 1957, he cannot sue the manufacturer when the tractor tears off his arm in 1987.

The courts' analysis of the assumed forewarning effect of the District Court's July 6, 1987 order also is insightful. Presumably, all Kansas City area taxpayers are to take speculative legal action based on a trial court's expressed "intention" to raise taxes. But would the District Court seriously have considered a taxpayer intervention plea on July 7, 1987? Who should sue? What would be the prayer? The conjecture is endless, as would be the volume of "protective" motions to intervene necessary to safeguard all contingent, even remote, taxpayer interests. How can someone challenge the validity of a judicially-

imposed tax if it has not yet been established in some detail? Even after September 15, 1987, subsequent modifying orders continued to change the use, nature and implementation of the court's taxes.[4]

What little news media coverage existed only amplified the confusion. The record below consisted of but one newspaper article that provides a perfect illustration of the type of ambiguous and contradictory "notice" given taxpayers as to how, what and when their interests "would be affected" by court action. School officials and plaintiffs' counsel randomly, even erroneously, speculated on the magnitude and types of taxes to be expected from the District Court, to the point of suggesting that a property tax increase would be less likely than an income surtax. While the July, 1987 order and article mentioned a possible earnings tax or surcharge, neither informed taxpayers that a massive court-ordered $1.95 property tax increase would be forthcoming.

The bizarre circumstances of this case do not provide the concrete indicia of clearly-delineated court action required by *NAACP v. New York,* 413 U.S. at 366-67. Petitioners' ten-day-old request for intervention was timely.

B. Petitioners Satisfied All Other Requirements For Intervention Of Right Under Rule 24(a)(2).

Neither court below questioned Petitioners' ability to satisfy the basic requisites for intervention of right. *See* Wright, Miller & Kane, *Federal Practice and Procedure*:

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4. By analogy, taxpayers' judicial challenges to a legislative taxation scheme would not be ripe until the legislative body had actually enacted the body of law subject to challenge. One could not file suit simply on the basis of reported committee hearings, amendments, floor debates, etc.

Civil 2d Section 1908 at 262 (2d ed. 1986); *Corby Recreation, supra,* 581 F.2d at 176; *Meyer Goldberg, Inc. of Lorain v. Goldberg,* 717 F.2d 290, 292 (6th Cir. 1983). Petitioners' property interest in the court-ordered tax liability is uncontroverted. *Donaldson v. United States,* 400 U.S. 517, 531 (1971). The impairment of this interest resulting from any affirmance of the judicial property taxation scheme is likewise certain. Finally, Petitioners' financial interests cannot be adequately represented by the existing parties in the litigation since all litigants, including joint and several tortfeasor the State of Missouri, benefit from the creation and implementation of a court-ordered or -approved property tax to generate supplemental revenues for funding the State's and the KCMSD's remedial desegregation responsibilities. *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 n.10 (1972).

These conclusions were validated by the District Court's recent decision to permit taxpayer intervention in the remanded desegregation proceedings to pursue a full refund of the unconstitutional income tax surcharge collections.

II.

THE LOWER COURTS' ERRONEOUS DENIAL OF PETITIONERS' INTERVENTION INFRINGED PETITIONERS' FUNDAMENTAL RIGHT TO PROTECT THEMSELVES FROM AN UNCONSTITUTIONAL SEIZURE OF THEIR PROPERTY BY A FEDERAL JUDGE'S UNPRECEDENTED DECISION TO LEVY PROPERTY TAXES.

Petitioners have pursued their appeal in this case to challenge the constitutionality of judicial taxation. Their objective is to stop the tax and protect their property;

they are not in this litigation solely to establish Rule 24 precedent. Recognizing the limitations of their status in the certiorari process, Petitioners nevertheless offer these insights into judicial taxation issues of "exceptional importance." (App., A53.)

A. The Judicial Taxation Scheme Constructed By The Lower Courts Exceeds The Limitations On The Federal Judiciary's Power Under Article III And Contravenes Fundamental Principles Of Constitutional Self-Governance.

The lower courts have concluded that the federal judiciary is empowered under Article III of the Constitution to levy taxes in order to remedy constitutional wrongs.

Before we readily accept this breathtaking expansion of judicial authority, it is imperative that we recognize the Framers' creation of a federal judicature designed to "always be the least dangerous" branch of government "to the political rights of the constitution." *The Federalist No. 78* (Hamilton). The judiciary was to have "no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and [could] take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.* Neither the history of our experiment in self-government nor relevant Supreme Court precedent authorize the federal courts to take such a dramatic course of political action as that taken by the lower courts in this case.

1. Taxation principles.

A first principle of American political thought, a premise forwarded by the philosopher John Locke which permeates both the Declaration of Independence and the United States Constitution, is that the power of the state is justified by the consent of the governed. Locke's consent theory served as a cornerstone for numerous written compacts central to this nation's political and legal development, including the Mayflower Compact, colonial charters, and the Declaration of Independence. The concept of representative taxation was simply a particular application of the consent theory, with roots deep in English constitutional history.[5] Locke is credited with delivering "the first great statement of fiscal limitation," J. Adams, *Secrets of the Tax Revolt* at 26 (Harcourt Brace 1984), *viz.*, the legislative branch "must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies." J. Locke, *The Second Treatise on Government* at 81 (Bobbs-Merrill ed. 1952).

"To the extent that taxation and representation did reflect the will of those persons who bore the principal burden of paying taxes, the English and American systems were, in truth, a matter of voluntary giving." F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* at 26-27 (University Press of Kansas 1985). The representative nature of the gift, or tax, is of crucial importance. "[I]t was the pivotal point in

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5. *See* The Massachusetts Resolves of October 29, 1765: "Resolved, that no Man can justly take the Property of another without his Consent: And that upon this original Principle the Right of Representation in the same Body, which exercises the Power of making Laws for levying Taxes, which is one of the main Pillars of the British Constitution, is evidently founded."

bringing about the American Revolution, and was subsequently incorporated into every constitution in the United States." *Id.* at 28. In a speech on the Declaratory Bill, William Pitt was most eloquent: "Taxation and representation are inseparable: this position is founded on the laws of nature; it is itself an eternal law of nature; for whatever is a man's own, is absolutely his own; . . . Taxation and representation are coeval with, and essential to, this constitution." *Bristol* (England) *Gazette*, Mar. 24, 1774 (speech of William Pitt on the Declaratory Bill).

Thomas Jefferson cohered these principles in the Declaration of Independence with the affirmation "Governments are instituted among Men, deriving their just powers from the consent of the governed." Jefferson cited the tyrannical King George III "For imposing Taxes on us with out our Consent" and "For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments."

Representative taxation eventually found its way into the document formed in Philadelphia in the summer of 1787. Where the Articles of Confederation had given the central government no power to levy taxes, the new Constitution provided that "The Congress shall have Power . . . To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, Section 8. Nowhere in the Constitution is the federal judiciary empowered to "lay and collect Taxes" of any kind or for any purpose. Such would be incompatible with a federal judicature intended to have "no influence over either the sword or the purse," the branch intended to have "neither Force nor Will, but merely judgment." *The Federalist*

No. 78, supra. Chief Justice John Marshall ratified the constitutional primacy of representative taxation in *Providence Bank v. Billings and Pittman,* 29 U.S. (4 Pet.) 514 (1830), when he stated that "the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation." *Id.* at 563.

The decisions of this Court have consistently safeguarded the principle of representative taxation. In *Rees v. City of Watertown,* 86 U.S. (19 Wall.) 107 (1873), the Supreme Court stressed:

> This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purpose only; and, second, by the power of legislative authority only. It is a power not extended to the judiciary. Especially it is beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important.

Id. at 116. *See Meriwether v. Garrett,* 102 U.S. 472, 512 (1880) (Field, J., concurring) ("The levying of taxes is not a judicial act. It has no element of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare."). *See also Yost v. Dallas County,* 236 U.S. 50 (1915); *Thompson v. Allen County,* 115 U.S. 550 (1885). "The substitution of government by the federal judiciary for local self-government involves dangerous disproportionality; it sacrifices fundamental democratic values in order to vindicate particular constitutional rights." Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 Stan. L. Rev. 661, 664 (1978).

One cannot justify unrepresentative judicial taxation by its objective. Honorable ends do not justify illegitimate means. The balance between the valid use and abuse of judicial authority is extremely delicate. "In short, judicial self-restraint and judicial power seem to be the opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained. . . . [Judicial power] has been maintained by a wise refusal to employ it in unequal combat." R. Tresolini, *American Constitutional Law* at 65 (2d ed. 1965) (*quoting* J. Roche, *Judicial Self-Restraint,* 49 Amer. Pol. Sci. Rev. at 722 (Sept. 1955)). The lower courts' employment of judicial power to tax Petitioners threatens the integrity of judicial authority itself.

2. The lower courts' levying of property taxes directly conflicts with this Court's Griffin decision.

Both the District Court and the Court of Appeals seize their power to impose unrepresentative tax increases by misstating and misapplying this Court's holding in *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964). The courts' analyses starkly illustrate the dangers of the slippery slope mechanism of judicial interpretation, incrementally vesting the judiciary with ever-expansive powers, leading ultimately to a judicially-recognized judicial power to impose unrepresentative taxes without any constitutional support.

In *Griffin,* the Supreme Court held that local county officials could not circumvent integration of the public schools under *Brown v. Board of Education,* 347 U.S. 483 (1954), by refusing to open and operate tax-supported public free schools. The Court noted that the county

board of supervisors had "the special responsibility to levy local taxes to operate public schools." 377 U.S. at 232. The Court concluded that the trial court "may if necessary to prevent further racial discrimination, *require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate* to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." *Id.* at 233 (emphasis added). It is manifest the Court did not itself order a tax levy increase, nor did the Court authorize the trial court to increase property tax levies or impose income tax surcharges for desegregation programs of its own contrivance. Most importantly, the *Griffin* Court did *not* state that a local property tax "may be increased" by a federal trial court "if necessary to raise funds adequate to . . . operate" a nondiscriminatory public school system, as the District Court concluded in its September 15, 1987 order. (App., A78.)

This more restrained interpretation of *Griffin* is perfectly consistent with the Supreme Court's decision just three years before in *Moses Lake Homes, Inc. v. Grant County,* 365 U.S. 744 (1961), a case involving a state's evaluation and taxation of federal statutory leaseholds. A unanimous Court reversed the Ninth Circuit's decision to remand the case to the district court to allow the trial court "to make the necessary adjustment" of discriminatory state taxes levied against federal lessees, and opined:

> The effect of the [Ninth Circuit's] remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree.

> Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one.

Id. at 752.

In another school desegregation case, *Plaquemines Parish School Board v. United States,* 415 F.2d 817 (5th Cir. 1969), the court duly noted the *Griffin* precedent and recognized that it "must be considered a unique case." *Id.* at 833. The Fifth Circuit observed: "The Prince Edward County schools were closed and the court directed that they be reopened and that taxes be levied and collected to operate them. The subjects of levy, tax rates, and collection methods were left to the commands of state law under state standards." *Id.*

It was not until 1975, in the case of *United States v. Missouri,* 515 F.2d 1365 (8th Cir.), *cert. denied,* 423 U.S. 951 (1975), that a new spin was given to *Griffin.* In *United States v. Missouri,* the trial court ordered the consolidation of three St. Louis suburban school districts and, after concluding that none of the three disparate tax rates would be sufficient "to effectively operate the desegregated district," 515 F.2d at 1371, ordered the new uniform levy to be set at a rate higher than the highest voter-approved rate of the consolidated districts.

The Eighth Circuit reduced the new consolidated district rate to the highest voter-approved rate of the three districts. As support, the Eighth Circuit relied on state taxation and annexation precedent. *Id.* at 1373. Although the appellate court did not approve the district court's setting of an increased levy, it concluded "[w]e are satis-

fied that the district court had the authority to implement its desegregation order by directing that provision be made for the levying of taxes essential to the operation of the new school district." *Id.* at 1372-73.

A decade later, in *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984), the federal judiciary's taxation power was expanded slightly further. There, the district court had ordered an interdistrict remedy and enjoined a scheduled reduction in the City of St. Louis school board's operating levy otherwise required by Missouri's property tax rollback statute to the extent the revenue would be needed to fund the City school board's share of desegregation costs. The district court reserved the authority to order an increase in the district's property tax levy if revenues were insufficient to desegregate city schools. 731 F.2d at 1300-01.

The Eighth Circuit affirmed the deferral of the rollback and held that the district court's "broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate," *id.* at 1320, a power to be "exercised only after exploration of every other fiscal alternative." *Id.* The *Liddell* court then read into *Griffin* the proposition that "the Supreme Court [had] acknowledged that the district court may order an increase in taxes to fund schools where the State has defaulted on its obligations to provide an equal educational opportunity to all students." *Id.* The *Liddell* court reached this conclusion by reasoning that the Supreme Court in *Griffin* "did not limit the scope of its holding by ordering a return to the previous tax levy or procedures," but "indicated only that the tax must be 'necessary to prevent further racial discrimination.'" *Id.*

Of course, the consequence of this reasoning contradicts the proffered proposition: the *Liddell* district court in effect increased the taxes of a select few taxpayers to fund the desegregation obligations of the State, obligations presumably to be shared by all State taxpayers. Moreover, this reasoning misconstrues *Griffin,* a fact not lost on one of the dissenters in *Liddell* who observed that the Supreme Court in *Griffin* had simply ordered school officials "to restore a tax illegally abolished, but specifically left the manner of levy and the amount and the means of collection to procedures under state law and standards." *Id.* at 1332 (Gibson, J., dissenting). This interpretation is buttressed by the Court's analysis in *Moses Lake Homes, Inc. v. Grant County, supra,* where this Court concluded that the federal judiciary's jurisdiction was limited to determining whether taxes levied were valid and did not extend to the assessment and levy functions.

The *Liddell* dissent most succinctly framed the issue in these terms:

> I have no quarrel with the proposition that, with proper findings that particular programs are necessary to remedy a constitutional violation that has been found to exist, a district court has the power to order the funding of those programs. The order should simply be in the form, however, to mandate that certain programs be carried out, and legislative bodies should be left with the responsibility for structuring the local or state taxing instrumentalities to achieve the result required. The federal courts go too far in mandating specific taxing procedures.

Id. (Gibson, J., dissenting). *See id.* at 1333 (Bowman, J., dissenting) ("I join in . . . [the] well-reasoned dissent

concerning . . . the singular inappropriateness in our Constitutional system of a federal court's ordering state and local taxing authorities to impose specific tax increases.").

Now we find the lower courts relying on *Griffin* for the proposition that a federal court can double a property tax levy for taxpayers not parties to the federal litigation, individuals who have never been held liable for the constitutional violations of the party defendants. If the lower courts' taxation decisions are upheld, there is no principled reason for limiting a federal court's creation and imposition of *any* tax to remedy *any* constitutional wrong.[6]

The Court of Appeals' entire discussion affirming the court-ordered tax levy is devoid of any constitutional provision, historical argument, or apposite Supreme Court precedent that support the premise that the federal judiciary is expressly empowered under Article III to impose taxes to generate revenues to fund court-ordered remedies. The opinion alleges a judicial power "to determine a remedy," but goes no further to cite historical support for a judicial power to legislate a new tax to fund a remedy. (App., A30-A31.) The opinion submits that the Tenth Amendment and the principle of separation of powers "simply have no bearing on the district court's options in enforcing its judgment" regarding the judicial

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6. Interestingly, in *Reece v. Gragg*, 650 F. Supp. 1297 (D. Kan. 1986), a district court enjoined the further unconstitutional operation of an overcrowded county jail, but refused to order capital expenditures for the construction of a new jail, stating:

> This Court has no reservoir of funds nor any suggested method of raising funds for the construction of a minimally sufficient jail. The Court has no architects, engineers or general contractors standing by. Even if this Court could order a new jail built, it would not do so. A decision such as that is a decision to be made by the political process, not by judicial fiat.

650 F. Supp. at 1306.

property tax (*id.*, A31), but fails to explain[7] why one or both of these constitutional doctrines support the reversal of the judicial income tax surcharge, which was deemed to have "invaded the province of the legislature." (*Id.*, A44.)

The judicial levying of taxes circumvents the political process; it substitutes a direct assessment of damages, in the form of taxes, against those not parties to the litigation in lieu of a judgment against the constitutional tortfeasors, the political entities responsible for resolving political crises like the one facing the KCMSD. *Griffin* cannot be viewed as bestowing a broad grant of power to the federal judiciary to levy new taxes to fund court-ordered remedies. A federal court's equitable powers are not unlimited in matters of state law and taxation. *See Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-44 (1973). *See also* McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 Harv. J. L. & Pub. Policy 507, 507-08 (1984).

3. Application of joint and several liability principles, in lieu of judicial property taxation, is the appropriate judicial remedy in this case.

Obviously, the lower courts did have an alternative to levying their own property taxes to fund the desegregation obligations of the State of Missouri and the KCMSD. The

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7. While the opinion discusses some practical considerations for this distinction, there is no constitutional justification cited for permitting the creation of a judicial property taxing power as an option in enforcing court judgments but not a judicial income taxing power.

courts could, and should, have assessed the necessary desegregation costs against its two joint and several tortfeasors and let the political processes determine how revenues to pay the damages will be raised.

In his dissent against the property tax, Chief Judge Lay pointed out that liability for desegregation funding between the State and the KCMSD "was based upon a finding of joint and several tortfeasors." (App., A50.) Judge Lay concluded:

> Thus, I do not feel that it was necessary for the district court or feasible for this court to approve a property tax levy by KCMSD to meet its fiscal responsibility. Where other alternatives remain, it is the very essence of judicial restraint not to go beyond the relief necessary. . . . I therefore would set aside the property tax levy ordered by the district court and use existing legal principles to effect constitutional compliance by holding the state liable for any deficiency KCMSD cannot contribute under the plan.

(*Id.*, A51-A52.)

The Court of Appeals' decision relied on State joint and several liability funding to aid the KCMSD in its anticipated shortfall due to the surcharge reversal. (*Id.*, A45.) The court even recognized the availability of State joint and several funding in the event the court-approved property tax levy limitation results in insufficient resources to meet desegregation costs. (*Id.*, A41 n.18.) Considering the finding of joint and several liability, the courts' imposition of property taxes was an erroneous judicial remedy.[8]

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8. The Eighth Circuit majority opinion did recognize the need to "modify [the property tax scheme's] future operation

(Continued on following page)

B. Petitioners' Exclusion As Parties Below Jeopardized Their Due Process Right To Challenge The Unconstitutional Seizure Of Their Property Through A Federal Court-Ordered Tax.

In its most basic form, due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *See* U.S. Const. amend. V; *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). *See Cleveland Board of Education v. Loudermill,* ..... U.S. ....., ..., 105 S. Ct. 1487, 1494 (1985) (tenured public employee is guaranteed notice of the charges against him and an opportunity to present "his side of the story"). Due process "incorporates notions of fair notice or warning," *Postscript Enterprises, Inc. v. Whaley,* 658 F.2d 1249, 1254 (8th Cir. 1981); it guarantees an aggrieved party the opportunity to present a case and have its merits fairly judged through "some form of hearing" before that party can be deprived of a protected interest. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982) (*citing Board of Regents v. Roth,* 408 U.S. 564, 570-71 (1972)). Although applying the Due Process Clause is an uncertain enterprise, courts must discover what "fundamental fairness" consists of in a given situation. *See Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18 (1981).

Footnote continued—

to more closely comport with limitations upon our judicial authority." (App., A6.) This modification—empowering the local school board to set future levy increases without a vote of the people subject to court approval—still does not remove the constitutional infirmities discussed above. *See* II.A.1 and II.A.2, *supra.*

There was no semblance of fairness or due process by the District Court when it levied taxes on Petitioners and then denied their request for intervention. Although not liable for the constitutional violations complained of, Petitioners, and other Kansas City area taxpayers similarly situated, have been deprived of their property in the exaction of remedial damages owed by someone else —and all without ever having had their day in court.

Petitioners' right to utilize the judicial process to protect their interests in challenging court-ordered property taxes persists. Although Petitioners were allowed to participate as *amici curiae*, their present inability to squarely present to this Court constitutional challenges to the judicial taxation scheme now in place threatens their property interests. Even if the State of Missouri petitions for review of the judicial property tax question (among numerous other complex desegregation issues), it is almost certain the State will not be advancing one of Petitioners' primary contentions, that the property tax be reversed and substituted with additional State funding under joint and several liability principles. Petitioners must be allowed to present "their side of the story."

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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